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IN THE UTAH COURT OF APPEALS

Unicity International, Inc., a Delaware
corporation,

Appellant/Defendant,

vs.

Roger Hooban, an individual,

Appellee/Plaintiff.

Case No. 20080922

BRIEF OF APPELLANT UNICITY INTERNATIONAL, INC.

Appeal from the Fourth Judicial District Court,
in and for Utah County, State of Utah,
Honorable Lynn W. Davis Presiding

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JURISDICTION

This Court has jurisdiction pursuant to Utah Code section 78A-4-103(2)(j).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

ISSUE

Whether the trial court erred in denying Appellant's motion requesting attorney fees under Utah Code section 78B-5-826, where Appellee sued to enforce a contract containing an attorney fees provision, and the trial court ultimately held that Appellant was the prevailing party. This issue was preserved in the trial court in Appellant's motion, at R. 1639, and in the trial court's ruling on the attorney fee issue, at R. 1856 and R. 1853, et seq.

STANDARD OF REVIEW

"Whether attorney fees are recoverable in an action is a question of law, which we review for correctness." Valcarce v. Fitzgerald, 961 P.2d 305, 315 (Utah 1998).

DETERMINATIVE STATUTORY PROVISION

Utah Code Ann. § 78B-5-826 (2008)¹:

A court may award costs and attorney fees to either party that prevails in a civil suit based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

¹ This section was recently renumbered; since it has not been substantially changed, we cite to the current version of the code throughout this brief.

STATEMENT OF THE CASE

This action is based upon a written contract (the “Agreement”), originally entered into between H&H Network Services, Inc. (“H&H”), and Appellant Unicity International, Inc. (“Unicity”).² After purchasing all of the outstanding stock of H&H at a bankruptcy auction in November 2004, Appellee Roger Hooban asserted that he was a party to the Agreement with Unicity. Hooban subsequently filed the complaint in this action in April 2005, alleging several causes of action against Unicity, including breach of contract, conversion, unjust enrichment, breach of good faith and fair dealing, intentional interference with economic relationship, and seeking injunctive relief and seeking attorney fees. All of Hooban’s claims were based upon the Agreement.

In August 2006, Unicity filed a motion for summary judgment on Hooban’s claims, arguing that Hooban lacked standing to enforce the Agreement upon which his claims were based. Hooban filed a cross motion for partial summary judgment in September 2006. In December 2006, the trial court granted Unicity’s motion and denied Hooban’s motion. In granting Unicity’s motion, the trial court held that Hooban lacked standing to enforce the Agreement, and that Unicity had properly terminated the agreement.

Unicity then moved to recover its attorney fees, based upon Utah Code section

² The original agreement was actually between H&H and Unicity’s predecessor in interest; in order to avoid confusing the relevant issues, however, this brief refers to Unicity and all predecessors in interest as “Unicity.”

78B-5-826 and the attorney fees provision in the Agreement. The motion was filed in February 2007, the trial court heard argument in June 2007, and the court ruled on the motion in July 2007. The trial court denied Unicity's motion, holding that Hooban was not liable for attorney fees since the court had previously held that he was not a party to the Agreement. Unicity now appeals that denial.

STATEMENT OF FACTS

Appellant Unicity International, Inc. ("Unicity") is a business engaged in the supply and marketing of various high-quality nutritional supplements and personal care products. (R. 201.) Unicity markets such products principally through direct selling, utilizing a network of independent business owners, commonly referred to as network or multi-level marketing. (Id.) As a network marketing company, Unicity enters into distributor agreements with independent business owners, also referred to as independent distributors. (Id.) Unicity independent distributors may be either individuals or business entities. (Id.) In general terms, a Unicity distributor earns monthly commissions based in part on his/her own sales activity and in part on the sales activity of his/her downline distributors. (R. 200.)

As part of the Unicity distributor agreement, every Unicity distributor agrees to be bound by the terms and conditions of Unicity's Policies and Procedures. (R. 152.) The Policies and Procedures contain certain restrictions on the transfer of a distributorship. (R. 182–83.) The Policies and Procedures grant Unicity the right to approve or

disapprove any distributorship transfer (or, in the case of a distributorship owned by a corporation, the transfer of interest in the corporation) and a “right of first offer” allowing Unicity to purchase the distributorship prior to any transfer. (R. 183.) Unicity can exercise its “right of first offer” to purchase the distributorship any time within ten business days after the distributor delivers a bona fide offer in writing to Unicity. (Id.)

H&H Network Services, Inc. (“H&H”) became the licensee of Unicity distributorship #120319 (the “Distributorship”) in 1994. (R. 199.) H&H entered into a distributorship agreement with Unicity (the “Agreement”), and was thus bound by Unicity’s Policies and Procedures. (R. 152.) At that time, H&H was wholly owned by John and Brenda Hargett. (R. 199.) Over the next ten years, H&H developed its own downline network of Unicity distributors. (Id.) On or about June 7, 2004, the Hargetts, as individuals, filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Washington. (R. 13, 143.)

Among the assets in the bankruptcy estate was all of the outstanding stock of H&H. (R. 139.) On or about November 19, 2004, the Bankruptcy Court held a hearing at which the H&H stock was offered by auction to the highest bidder. (R. 135.) At the auction, Appellee Roger Hooban offered the winning bid of \$32,000, and tendered that amount to the Bankruptcy Trustee on or about November 30, 2004. (R. 131, 136–38.)

Unicity did not receive written notice of Hooban’s offer to purchase the stock of H&H for \$32,000 until December 3, 2004, by facsimile transmittal of an Order

Authorizing Sale of Stock from Timothy W. Dore, the Bankruptcy Trustee. (R. 126–29, 198.) H&H did not obtain Unicity’s approval to transfer the stock to Hooban, nor did it provide Unicity with the requisite “right of first offer” to purchase the Distributorship on the same terms of the Hooban offer, as H&H was contractually required to do pursuant to Unicity’s Policies and Procedures. (Id.)

On or about December 7, 2004, four days after receiving the notice of the Order Authorizing Sale of Stock, Unicity informed H&H and Hooban by certified mail that Unicity was exercising its right of first offer, and that it would purchase the Distributorship for \$32,000.00. (R. 86–87.) Unicity further informed H&H and Hooban that H&H no longer held an ownership interest in the Distributorship. (R. 86.) Hooban and H&H refused to accept Unicity’s exercise of its right to purchase the Distributorship for \$32,000.00, refused to accept any money from Unicity, and asserted that Hooban should be recognized as the licensee of the Distributorship. (Id., R. 198.)

Hooban subsequently filed his complaint against Unicity, alleging several claims, including breach of contract, conversion, unjust enrichment, breach of good faith and fair dealing, and intentional interference with economic relationship, and seeking injunctive relief and attorney fees. (R. 1–16.) Each cause of action alleged by Plaintiff Hooban was based on the Agreement, which Hooban asserted was enforceable between Unicity and himself. (Id.)

Both Unicity and Hooban filed motions for summary judgment on Hooban’s

claims. (R.1132–33, 1215–16.) The trial court granted Unicity’s motion and denied Hooban’s motion. (R. 1582–85.) In granting Unicity’s motion, the trial court agreed with Unicity’s argument that Hooban lacked standing to enforce the Agreement. (R. 1584.) The trial court further held that “[s]ince all of the claims of [Hooban’s] complaint arise out of the contract, his action against Unicity must be dismissed.” (R. 1583.)

The Agreement, upon which all of Hooban’s claims were based, contains the following attorney fees provision: “In the event of a dispute, the prevailing party shall be reimbursed attorney’s fees and reasonable travel and accommodation costs by the other party.”³ (R. 150–51.) Based upon this provision, in fact, Hooban’s complaint included a cause of action seeking attorney fees. (R. 4.) Unicity was ultimately the prevailing party, however, and accordingly brought a motion for attorney fees based upon Utah Code section 78B-5-826 and the attorney fees provision in the Agreement. (R. 1630–31.)

Unicity filed its motion to recover attorney fees incurred in this matter on February 7, 2007. (Id.) On February 26, 2007, Hooban responded to Unicity’s motion, arguing that because the trial court had held that Hooban was not a party to the Agreement, any claim for attorney fees made by Unicity must fail. (R. 1778–1808.) Unicity replied to Hooban’s opposition on March 8, 2007, (R. 1824–29), and the trial court held a hearing on the matter on June 4, 2007. (R. 1841.)

³ This attorney fee provision is also included in Unicity’s Policies and Procedures (R. 147–90), which is incorporated into the Agreement by reference. (R. 152.)

On July 19, 2007, the trial court denied Unicity's motion requesting attorney fees. (R. 1842–50.) In its ruling, the trial court stated that, based on the court's ruling that Hooban lacked standing to enforce the Agreement, "[i]t is clear under the Utah Court of Appeals' interpretation of [section 78B-5-826] . . . that Unicity cannot recover attorneys' fees pursuant to the statute." (R. 1844.)

SUMMARY OF ARGUMENTS

Under Utah Code section 78B-5-826, Unicity may recover attorney fees incurred in successfully defending against Hooban's claims by invalidating Hooban's interest in the Agreement. Hooban's claims were entirely based upon the Agreement, which contains an attorney fees provision. Because Hooban would have recovered attorney fees if his claims had succeeded, under Utah Code section 78B-5-826 he is reciprocally liable for Unicity's attorney fees since he was unsuccessful. The Utah Supreme Court specifically endorsed this interpretation of section 78B-5-826 in Bilanzich v. Lonetti, 2007 UT 26, 160 P.3d 1041, and it is also consistent with precedent in other jurisdictions.

The Bilanzich Court laid out a specific framework for analyzing claims for attorney fees under Utah Code section 78B-5-826. Unicity has met the two conditions required by the Bilanzich framework, and thus may recover attorney fees. The trial court erred by effectively requiring a third condition: post-litigation enforceability of the agreement. Section 78B-5-826 includes no such requirement, and the Bilanzich Court specifically stated that the enforceability of the subject contract was not a requirement of

recovering attorney fees.

The public policy underlying the statute also supports allowing Unicity to recover attorney fees. That policy is to “level the playing field” where one party is exposed to the risk of attorney fees if it loses, but the other party is not exposed to a corresponding risk. This is exactly the position that Unicity finds itself in as a result of the trial court’s ruling. Reversing the trial court will effectuate the public policy underlying the statute, as well as level the playing field between similarly situated plaintiffs and defendants. Additionally, reversing the trial court’s ruling will allow defendants to choose how to defend contract claims, without worrying that certain defenses will result in attorney fees, while others will preclude them.

Finally, while the trial court has discretion under the statute whether to award attorney fees, the Supreme Court has said that, in situations like this one, trial courts “should award fees liberally” under the statute. Based upon the foregoing, the trial court’s ruling should be reversed, and Unicity should be able to recover attorney fees.

ARGUMENT

I. Both statutory and case law support Unicity’s recovery of attorney fees under Utah Code section 78B-5-826.

The trial court erred in holding that Unicity could not recover attorney fees because the Agreement was unenforceable. Unicity’s motion to recover fees was based upon Utah Code section 78B-5-826, which allows a court to award attorney fees where

the underlying contract has an attorney fee provision. The plain language of the statute supports Unicity's recovery of attorney fees.

The Utah Supreme Court directly addressed this attorney fees issue in Bilanzich v. Lonetti, 2007 UT 26, 160 P.3d 1041. Bilanzich was issued on March 20, 2007—after the parties had briefed Unicity's motion requesting attorney fees, but before both the hearing and the trial court's ruling. In Bilanzich, the Supreme Court held that the unenforceability of a contract did not preclude the award of attorney fees to a prevailing party on litigation based upon the underlying contract. The trial court in this case, however, held that the unenforceability of the Agreement barred Unicity's recovery of attorney fees. The trial court therefore erred in denying Unicity's motion requesting attorney fees.

A. Utah Code section 78B-5-826 authorizes the recovery of attorney fees where the subject agreement contains an appropriate attorney fees provision.

“Generally, a party is entitled to attorney fees only as provided by contract or statute.” Cottonwood Mall Co. v. Sine, 830 P.2d 266, 269 (Utah 1992). Utah Code section 78B-5-826 states:

A court may award costs and attorney fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees.

Utah Code Ann. § 78B-5-826 (2008). According the plain language of the statute, when

the contract underlying an action contains an attorney fees provision, and a civil action based upon that contract ensues, then the party that prevails on that action may recover attorney fees.

Hooban's claims against Unicity were based entirely upon the Agreement, which contains an attorney fees provision. The relevant provision states that "[i]n the event of a dispute, the prevailing party shall be reimbursed attorney's fees and reasonable travel and accommodation costs by the other party." (R. 150–51.) Roger Hooban sued Unicity, claiming to be a party to, and seeking to enforce, the Agreement. (R. 1–16.) Indeed, Hooban sought attorney fees pursuant to the Agreement in his complaint. (R. 4.) In the resulting litigation, the trial court dismissed Hooban's claims, agreeing with Unicity that Hooban did not have standing to enforce the Agreement. (R. 1582–85.) Unicity was therefore the prevailing party, and as such, under Utah Code section 78B-5-826 is entitled to recover its attorney fees incurred in defending this action.

The trial court, however, ruled that Unicity could not recover attorney fees because, "[b]y finding that Mr. Hooban is not a party to the Agreement, the court in this matter *precluded* Mr. Hooban from having any contractual obligation⁴ to Unicity under the Agreement . . . including the provision for attorneys' fees." (R. 1844 (emphasis

⁴ The trial court's ruling misstates the issue—Hooban's obligation to pay Unicity's attorney fees is not a "contractual obligation," it is a *statutory* obligation under Utah Code section 78B-5-826, which is, in turn, based upon the terms of the contract underlying the litigation.

added).) This ruling is incorrect based upon the plain language of Utah Code section 78B-5-826, which allows the award of attorney fees when one party prevails on an action based upon a contract containing an attorney fees provision; the trial court's ruling should therefore be reversed.

B. The Utah Supreme Court has held Utah Code section 78B-5-826 allows a prevailing party to recover attorney fees when the underlying contract has been successfully defended as being unenforceable.

The Utah Supreme Court has specifically upheld the applicability of section 78B-5-826 where a written agreement was successfully defended as being unenforceable. In Bilanzich v. Lonetti, 2007 UT 26, 160 P.3d 1041, the Court awarded attorney fees to a party where the underlying agreement was declared unenforceable. Bilanzich thus supports Unicity's recovery of attorney fees.

In Bilanzich, a personal guaranty had been executed by Bilanzich that would, if certain conditions were met, be delivered to and be enforceable by Lonetti. At least one condition precedent was never met, but the guaranty, which should have been returned to Bilanzich, was mistakenly delivered to Lonetti. Bilanzich then sought to have the guaranty declared unenforceable for lack of a condition precedent. The trial court ultimately ruled in Bilanzich's favor, holding that the guaranty was unenforceable because of the lack of a condition precedent.

Because the guaranty contained an attorney fees provision, Bilanzich moved to

recover attorney fees incurred in prosecuting Bilanzich’s declarative action against Lonetti. The trial court held, and this Court affirmed, however, that recovery was inappropriate because, “a party may not avoid [a] contract and, at the same time, claim the benefit of the provision for attorney fees.” Bilanzich, 2007 UT 26, ¶ 8 (internal quotation marks omitted).

The Utah Supreme Court reversed, holding that the enforceability of the guaranty was *not* a factor in determining whether a prevailing party could recover attorney fees.

Rather, the Court held:

The plain language of Utah Code section [78B-5-826] provides that a court may award costs and attorney fees to a prevailing party in a civil action if two main conditions are met. First, the civil action must be “based upon any promissory note, written contract, or other writing.” And second, “the provisions of the promissory note, written contract, or other writing” must “allow at least one party to recover attorney fees.”

Id. ¶ 14 (quoting Utah Code Ann. § 78B-5-826). Thus, the Utah Supreme Court specifically endorsed section 78B-5-826 as set forth above. Additionally, the Court’s two conditions make up a useful two-part framework for courts to use to determine whether attorney fees are appropriate under the statute.

Applying the facts of Bilanzich to the new framework, the Supreme Court held that the two conditions had been met since the claim in Bilanzich was “based entirely upon the personal guaranty,” and “the guaranty provides for an award of attorney fees” to one of the parties. Id. ¶¶ 15–16. Thus, the Supreme Court held, Bilanzich could recover

attorney fees under section 78B-5-826, even though the guaranty had been found to be unenforceable.

The Bilanzich decision was recently upheld by the Court in Giusti v. Sterling Wentworth Corp., 2009 UT 2, 201 P.3d 966. In Giusti, the Court noted that “[i]n Bilanzich, we held that when a contract creates ‘an unequal exposure to the risk of contractual liability for attorney fees,’ district courts may apply section 78B-5-826 to ensure that both parties are subject to the attorney fee provision.” Giusti, 2009 UT 2, ¶ 77.⁵

II. Applying the facts of Hooban v. Unicity to the Bilanzich framework shows that Unicity may recover attorney fees.

Unicity moved to recover attorney fees incurred in defending against Hooban’s claims based upon Utah Code section 78B-5-826. (R. 1630–31.) The trial court denied Unicity’s motion, holding that the unenforceability of the Agreement barred enforcement of the attorney fees provision, and thus barred any recovery of attorney fees by Unicity. (R. 1842–50.) The trial court erred, however, in so holding; applying the facts of this case to the Bilanzich framework shows that Unicity should be allowed to recover attorney

⁵ In Giusti, the Court did not award attorney fees to the prevailing party, because the relevant provision awarded attorney fees to the “non-defaulting party.” The Giusti Court held that, because there had been no default, the provision had not been triggered. The relevant provision in this case, however, awards attorney fees to the “prevailing party,” as did the provision in Bilanzich. (R. 150–51.) Accordingly, the holding in Giusti is distinguishable from the present facts.

fees incurred in defending against Hooban's claims.

A. Bilanzich requires two factors, both of which have undisputedly been met by Unicity.

The Bilanzich framework has two conditions which, when met, "provide[] that a court may award costs and attorney fees to a prevailing party in a civil action." Bilanzich

¶ 14. The first prong requires that a party to the litigation assert the contract's enforceability. The second prong requires that the contract contain an appropriate attorney fees provision. Unicity has undisputedly met both of the required conditions, and therefore may recover attorney fees.

The first condition "requires only that a party to the litigation assert the writing's enforceability as basis for recovery." Id. ¶ 15. The first condition has been met. Hooban's claims against Unicity were based entirely upon the Agreement. Hooban's complaint alleged seven causes of action, each of which was based upon the Agreement and Unicity's alleged breach thereof. (R. 1–16.) In alleging these claims, Hooban asserted the Agreement's enforceability as basis for recovery. This satisfies the first condition.

The second condition required by Bilanzich is that the contract "allow at least one party to recover attorney's fees." Utah Code Ann. § 78B-5-826. The Agreement provides that "[i]n the event of a dispute, the prevailing party shall be reimbursed attorney's fees" (R. 150–51.) The language of the attorney fee provision is broad,

and would have allowed Hooban, had he been the prevailing party, to recover attorney fees. This satisfies the second condition. Applying the facts of this case to the Bilanzich framework, therefore, clearly shows that Unicity may recover attorney fees as the prevailing party under Utah Code section 78B-5-826.

B. The trial court erred in requiring that the contract be enforceable against Hooban post-litigation in order for Unicity to be able to recover attorney fees under Utah Code section 78B-5-826.

The trial court erred in denying Unicity’s application for attorney fees because it based its decision on its previous holding that Hooban was not a party to the Agreement, and therefore “the terms of the agreement, including the prevailing party provision, do not apply to him.” (R. 1845.) Effectively, the trial court added a third condition to the Bilanzich framework: that the contract remain enforceable against the non-prevailing party following the conclusion of the civil action.

In Bilanzich, however, the Supreme Court specifically disavowed the use of the enforceability of the underlying contract in determining whether to award attorney fees under section 78B-5-826:

Although the guaranty itself was rendered unenforceable . . . the language of the statute *focuses on the provisions of the writing rather than its legal effect*. Under the statute, it is immaterial that events outside of the writing rendered the guaranty ineffectual because the provisions of the guaranty “allow[ed] at least one party to recover attorney’s fees.”

Bilanzich, 2007 UT 26, ¶ 16 (emphasis added). The ultimate enforceability of the

contract, therefore, is not a factor in determining whether attorney fees may be recovered. Rather, the Bilanzich framework “requires only that a party to the litigation assert the writing's enforceability as basis for recovery; the statute's plain language does not require that the writing actually be enforceable.” Id. ¶ 15. Hooban asserted the Agreement’s enforceability as the basis for recovery. In fact, Hooban cited *the attorney fees provision at issue* as the basis for recovery. (R. 4.) Thus, Unicity has met the required conditions in order to recover its attorney fees incurred in defending against Hooban’s claims. The trial court’s ruling to the contrary should be reversed.

III. The policy behind Utah Code section 78B-5-826 supports Unicity’s argument that it should be able to recover attorney fees incurred in defending against Hooban’s claims.

The Bilanzich Court noted that one of the purposes behind Utah Code section 78B-5-826 was “to remedy the exposure of the parties to uneven litigation risks.” Bilanzich, 2007 UT 26, ¶ 19 n.7. Specifically, the Court stated, the purpose of the statute was to rectify “the inequitable common law result where a party that seeks to enforce a contract containing an attorney fees clause has a significant bargaining advantage over a party that seeks to invalidate the contract. The former could demand attorney fees if successful, while the latter could not.” Id. at ¶ 18. In order to avoid such situations, the Court noted, the statute “seeks to remedy the exposure to uneven litigation risks.” Id. at ¶ 19 n.7.

This inequitable situation is *precisely* where Unicity finds itself as a result of the

trial court's ruling below. It is also the situation that other, similarly situated parties will be in if the trial court's ruling is allowed to stand. Had Hooban been successful on his claims, he would have been able to recover attorney fees. Because Hooban was unsuccessful, however, the trial court held that Unicity was barred from seeking attorney fees.

A similarly situated plaintiff, when suing to enforce an agreement, would have “a significant bargaining advantage over a party that seeks to invalidate the contract.” Id. Effectively, a Hooban-like plaintiff could file a suit knowing that, if he wins, he will be able to recover attorney fees based upon the contractual language, but that he will not be required to pay the other side's attorney fees if he loses. In such a case, the Hooban-like plaintiff would have a significant bargaining advantage in settlement negotiations, because a defendant's potential loss would include paying the plaintiff's attorney fees, while the defendant could not possibly recoup its own attorney fees if it successfully defended the claims.

That same advantage is plainly apparent in this matter, where Hooban included a cause of action for attorney fees based upon the relevant provision in the Agreement, but has balked at Unicity's motion for attorney fees based upon section 78B-5-826 and *the very same provision*. Because of the inequity inherent in such one-way fee shifting, the Bilanzich Court held that Utah Code section 78B-5-826 allows for the recovery of attorney fees by a defendant on a contract enforcement action, whether the contract is

defended as being unenforceable or by other means.

This inequity has also been recognized by other jurisdictions. In California, for example, courts have held:

[T]he prevailing party is entitled to attorney's fees even when it wins on the grounds that the contract is inapplicable, invalid, unenforceable or non-existent, so long as the party pursuing the lawsuit would have been entitled to attorney's fees had it prevailed. The rationale is that . . . *it would be inequitable to deny attorney's fees to one who successfully defends, simply because the initiating party filed a meritless case.*

Rainier Nat. Bank v. Bodily, 232 Cal.App.3d 83, 85–86, 282 Cal.Rptr. 926 (1991)

(emphasis added). The Supreme Court of Nevada has held that a plaintiff could recover attorney fees on a contract that it showed was void by way of rescission. Mackintosh v. California Fed. Sav. & Loan Ass'n, 115 Nev. 393, 405–06, 935 P.2d 1154 (Nev. 1997).

In Arizona, the Arizona Supreme Court stated: “[A]llowing attorney's fees only where there is a breach of a valid contract and not where the dispute concerns the validity of the contract . . . would be both inequitable and unjust.” Marcus v. Fox, 150 Ariz. 333, 336, 723 P.2d 682 (Ariz. 1986).

As a final matter, the trial court's ruling in this case establishes an inequitable double standard for contract defenses. If the trial court's ruling were to be upheld, certain defenses, such as fraud in the inducement, standing, rescission, and mistake, which would render the subject agreement unenforceable, would not result in attorney fees for a defendant if successful, because the contract would no longer be enforceable. If a

defendant was successful on other defenses, however, such as excuse, performance, material breach, frustration of purpose, and impossibility, she would be able to recover attorney fees. Thus, in deciding how to defend against a contract claim, a defendant would have skewed incentives in deciding how to go about her defense. This result is inequitable to defendants.

Had Hooban been successful on his claims, he would have been entitled to attorney fees. Unicity successfully defended against Hooban's contract claims, but the trial court held that attorney fees could not be recovered. This result is inequitable and is contrary to the public policy behind Utah Code section 78B-5-826. It is especially egregious given that Hooban is an attorney, and therefore knew that by filing his complaint, which was based *entirely* upon the Agreement, he was causing Unicity to incur attorney fees. Accordingly, the trial court's decisions should be reversed.

IV. The Utah Supreme Court has held that courts should exercise their discretion to award fees liberally under Utah Code section 78B-5-826 to remedy unequal exposure to litigation risks.

Utah Code section 78B-5-826 allows courts "to exercise discretion in awarding attorney fees and costs." Bilanzich, 2007 UT 26, ¶ 17; see Utah Code Ann. § 78B-5-826 ("A trial court *may* award costs and attorney fees" (emphasis added)). Accordingly, the Court has directed, "district courts should look to the policies underlying the statute in exercising this discretion." Id. As noted, one of the main purposes that the Utah

Supreme Court identified as underlying the statute is to level the playing field between plaintiffs seeking to enforce a contract and defendants seeking to defend against enforcement by invalidating the contract.

“Consequently,” the Bilanzich Court stated, “in order to further the statute’s purpose, the exposure to the risk of a contractual obligation to pay attorney fees must give rise to a corresponding risk of a statutory responsibility to pay fees.” Id. ¶ 19. Unicity was exposed to the risk of an obligation to pay attorney fees to Hooban under the attorney fee provision of the Agreement. Consequently, Hooban must bear the corresponding risk of a responsibility to pay Unicity’s attorney fees under Utah Code section 78B-5-826.

Accordingly, the Supreme Court advised courts that “[i]n exercising their discretion, therefore, district courts *should award fees liberally* under Utah Code section [78B-5-826] where pursuing or defending an action results in an unequal exposure to the risk of contractual liability for attorney fees.” Id. (emphasis added). Unicity’s “unequal exposure” in this cases is precisely the situation the Court described. Because of the nature of its defense, Unicity bore an unfair exposure to the risk of paying attorney fees. In exercising its discretion, therefore, the trial court should have “award[ed] fees liberally” under the statute. Instead, the trial court held that Unicity was precluded from recovery attorney fees, because the contract was unenforceable.⁶ The trial court’s

⁶ The trial court did include a brief mention of discretion in its order, stating: “In addition, Defendant overlooks the fact that the award of attorney fees, in [the statute], is permissive. The court can take into account the very unique circumstances and facts of

decision not to allow Unicity to recover fees should therefore be reversed.

CONCLUSION

Based on the foregoing, Unicity should recover attorney fees incurred in successfully defending against Hooban's claims. Unicity therefore respectfully requests that the Court of Appeals reverse the trial court's determination that no attorney fees could be recovered, and that the Court of Appeals instruct the trial court to exercise its discretion by awarding Unicity attorney fees under Utah Code section 78B-5-826.

DATED: May 22, 2009

SMITH, CHAPMAN & CAMPBELL
A Professional Law Corporation

BY: _____
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International, Inc.

each case.” (R. 1844.) The trial court clearly based its ruling, however, on its erroneous conclusion that, as a matter of law, Unicity could not recover attorney fees, e.g.: “It is clear under the Utah Court of Appeals’ interpretation of [the statute] and its holding in West, that Unicity cannot recover attorneys’ fees pursuant to the statu[t]e based upon the prevailing party language of the Agreement, regardless of the scope or typicality of that language,” id., and “ . . . [Mr. Hooban] has never executed the agreement and cannot be bound by its terms.” (R. 1843.)

Even if this Court were to determine that the trial court exercised its discretion in denying Unicity’s motion for attorney fees, the trial court’s decision was an abuse of discretion, as detailed above.

CERTIFICATE OF SERVICE

I certify that I am employed by the law offices of Smith, Chapman & Campbell, attorneys for defendant, UNICITY INTERNATIONAL, INC. herein; and that on **May 22, 2009** I served the attached **BRIEF OF APPELLANT UNICITY INTERNATIONAL, INC.** to the following, representing Plaintiff, Counterclaim Defendant, and Appellee Roger Hooban, in the manner indicated below:

☒ **(U.S. MAIL)**

I placed two copies of the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail in Orange County, California, by regular U.S. first class mail.

☐ **(OVERNIGHT DELIVERY)**

I deposited such envelope, with the **Federal Express** delivery service with billing information affixed thereon at Santa Ana, California in the ordinary course of business.

☐ **(FACSIMILE)**

I sent such document via facsimile or machine to the below named individual prior to 5:00 p.m. on xxx, and received a confirmation that the transmission was successfully completed.

☐ **(PERSONAL DELIVERY)** by causing personal delivery by Statewide Process Servers of the document(s) listed above.

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